No. 9989.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HYMAN HOWARD GOODMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE UNITED STATES.

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Statement of the Case.

An indictment was returned by the Grand Jury in the Central Division of the Southern District of California, on October 22, 1941, charging Kichiro Takizawa, George M. Nakauchi, Kenkichi Takahashi, Hyman Howard Goodman, Elwood L. Keeler, Hiroshi Yamaguchi with violating Title 18, United States Code, Section 88,[1] in that they did, prior to the dates of the commission of the overt acts hereinafter set forth, knowingly, wilfully, unlawfully, corruptly and feloniously conspire, combine, confederate,

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[1]Title 18, United States Code, Section 88 (Criminal Code, Section 37).

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (R. S. §5440; May 17, 1897, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321, §37, 35 Stat. 1096.)

arrange and agree to commit an offense against the United States of America, namely, the violation of Title 50, United States Code, Section 99,[2] and the Presidential Proclamation, dated July 2, 1940 (No. 2413),[3] which made it unlawful to export industrial diamonds from the United States without authorization of a license from the Secretary of State, as required by said Presidential Proclamation.

Certain overt acts are set forth in the indictment, among which are the following:

1. During the month of August, 1941, the exact date being to the grand jurors unknown, defendant Hiroshi Yamaguchi furnished the sum of $13,000.00 to defendant Kichiro Takizawa;

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[2]Title 50, United States Code, Section 99.

Whenever the President determines that it is necessary in the interest of national defense to prohibit or curtail the exportation of any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof, he may by proclamation prohibit or curtail such exportation, except under such rules and regulations as he shall prescribe. Any such proclamation shall describe the articles or materials included in the prohibition or curtailment contained therein. In case of the violation of any provision of any proclamation, or of any rule or regulation, issued hereunder, such violator or violators, upon conviction, shall be punished by a fine of not more than $10,000, or by imprisonment. The authority granted in this section shall terminate June 30, 1942, unless the Congress shall otherwise provide. July 2, 1940, 10:55 a. m., E. S. T., c. 508, §6, 54 Stat. 714.

[3]Presidential Proclamation of July 2, 1940 (No. 2413).

". . . And I do hereby further proclaim that upon the recommendation of the aforesaid Administrator of Export Control, I have determined that it is necessary in the interest of the national defense that on and after July 5, 1940, the articles and materials hereinafter listed shall not be exported from the United States except when authorized in each case by a license as hereinafter provided: . . .

"i. Industrial diamonds.

". . . And I do hereby empower the Secretary of State to issue licenses authorizing the exportation of any of the said articles and material . . ."

Statutes, Proclamations, and Executive Orders Pertaining to National Defense Matters (U. S. Dept. of Justice, Jan. 15, 1941).

2. On or about August 11, 1941, defendant Elwood L. Keeler sold to defendant Hyman Howard Goodman in the presence of defendant Kenkichi Takahashi approximately $2210.11 worth of industrial diamonds;

3. On or about September 4, 1941, defendant Elwood L. Keeler sold to defendant Hyman Howard Goodman in the presence of defendants Kenkichi Takahashi and Kichiro Takizawa approximately $3731.00 worth of industrial diamonds;

4. On or about September 16, 1941, defendants Elwood L. Keeler, Hyman Howard Goodman, Kenkichi Takahashi, Kichiro Takizawa and George M. Nakauchi met at Los Angeles, California;

5. On or about October 16, 1941, defendant George M. Nakauchi had in his possession approximately $15,000 worth of industrial diamonds [R. 2-4].

The defendants Takizawa, Nakauchi and Takahashi pleaded guilty, while the indictment was dismissed as to Yamaguchi upon the motion of the government. Thereafter appellant Goodman and the defendant Keeler were tried by a jury before the Honorable Ben Harrison, judge of the United States District Court for the Southern District of California, November 25-27, 1941, and were both found guilty. Upon this conviction the appellant Goodman was sentenced on December 1, 1941, to two years' imprisonment and to pay a fine of $5000 [R. 6-8, 18-19]. It is from this sentence that the appellant Goodman now prosecutes the appeal herein.

Statement of Facts.

In general, the Government concedes that the statement of facts set forth by the appellant in his brief (pp. 2-11) is accurate as far as it goes and fairly complete. However, because of the misplacing of emphasis upon certain facts and the inadequate statement of other facts, the government deems it necessary to outline briefly the more salient facts indicating that a conspiracy to export industrial diamonds *without a license* existed and that appellant Goodman was intimately connected with and directly participated in it.

The Conspiracy Was to Export Industrial Diamonds to Japan Without a License.

It should be noted that appellant, in his brief, frankly admits that the Government at the trial introduced sufficient evidence to show a combination, conspiracy or agreement to purchase industrial diamonds for the purpose of exportation to Japan (App. Br. p. 14 *et seq.*). Even a casual perusal of the record, including the admissions by appellant Goodman himself [R. 64-68, 99-106], leads to the inescapable conclusion that such a conspiracy was established. The sole question therefore is whether or not the conspiracy was to export industrial diamonds *without a license.*

First of all it should be emphasized that none of the defendants named in the indictment had a license from the Secretary of State which would authorize or permit him to export industrial diamonds from the United States to Japan [R. 19], nor did appellant Goodman have such a license [R. 71].

Obviously the only purpose for the many transactions looking toward the purchase and delivery of industrial diamonds by Goodman, as well as the actual deliveries and payments made through Goodman, was to export those industrial diamonds to Japan. Goodman knew this because Takahashi told him so [R. 20]. And Goodman agreed to obtain the industrial diamonds for that purpose [R. 21-22, 24].

Not only did Goodman know that orders were coming from Japan, as indicated, but he also learned from Takahashi that an order had actually been received from Japan [Takahashi, R. 24; Takizawa, R. 47].

After the first shipments had been made to Japan Takahashi told Goodman that he had received letters from Japan referring to the quality of the industrial diamonds and demanding extra good quality [R. 30-31].

Takahashi knew that he could not send industrial diamonds to Japan without a license and, for that reason, asked Goodman to get an export license for him, thus putting Goodman on notice of the destination of the diamonds [R. 37].

Furthermore, there were a number of circumstances which indicated to Goodman that Takahashi wanted the industrial diamonds for the purpose of export to Japan, although he did not have such a license. For instance, Goodman had been associated in a company with Takahashi for several years prior to the conspiracy charged in the indictment herein, and that company had been formed for the purpose of exporting merchandise to Japan [R. 106]. Goodman also knew that Takahashi had just returned from Japan at the time of the negotiations for the purchase of industrial diamonds. Thus he was cer-

tainly put on notice that the destination of the industrial diamonds would be Japan, although Takahashi didn't have a license, and Goodman knew that there was an embargo on shipments to Japan [R. 112]. Goodman, in a signed statement, admitted that Takahashi, some time in either July, August or September, 1941, had told him that he could not pay for the diamonds "until the ship gets in" and that he would pay Goodman his commissions "when the boat arrives" [R. 66].

Keeler, one of the co-conspirators and a convicted defendant, freely admitted that the orders which he was receiving through Goodman from the Japanese were the first orders he had ever filled for Japanese [R. 95], and that the purchases thus made through Goodman by the Japanese were the largest in the history of the company [R. 94]. These facts also would seem to warrant an inference by the jury that the co-conspirators were buying and selling the industrial diamonds solely for the purpose of export to Japan *without a license,* since they all knew that none of them had a license.

Appellant Goodman's Connection With the Conspiracy.

Goodman first met Takahashi some time in 1937 and had been associated with Takahashi from that time up until March 27, 1941, in a company which was exporting merchandise to Japan in 1939 [R. 99, 106]. In June of 1941, shortly after Takahashi had returned from Japan, Goodman discussed with him the possibility of obtaining

a number of items of merchandise, including industrial diamonds [R. 99-100]. Thereafter, from the middle of June, 1941, until September, 1941, Goodman had numerous negotiations with Takahashi, Takizawa and Nakauchi as purchasers, and Keeler and the Musto-Keenan Co. as sellers, of industrial diamonds [McCormick, R. 67; Goodman, R. 101-103; Takahashi, R. 23-34; Takizawa, R. 46-48; Nakauchi, R. 50; LeGrand, R. 76-80; Keeler, R. 87-91]. In all of these transactions Goodman acted as intermediary and broker, arranging for the sales and purchases himself. Some of the negotiations took place in his office [R. 31-2] and others occurred in the offices of the Musto-Keenan Co. [R. 31], but Goodman was the most active participant in all of them [Takahashi, R. 20-37; Takizawa, R. 46-49; Nakauchi, R. 50-51; Keeler, R. 87-91; Goodman, R. 99-106].

Furthermore, as pointed out above, appellant Goodman had full knowledge of the purpose for which the industrial diamonds were being purchased in such quantities, and knew full well that the ultimate destination of them, according to the understanding of all the parties to the conspiracy, was to be Japan, although none of the parties had a license to export as required by law. (See: Government's Statement of Facts herein under the heading "THE CONSPIRACY WAS TO EXPORT INDUSTRIAL DIAMONDS TO JAPAN WITHOUT A LICENSE.")

Questions Involved.

I. Did the District Court err in denying the motions for a directed verdict of not guilty against the appellant Goodman, made at the end of the Government's case and at the end of the entire case?

II. Did the District Court err in overruling the objections, and denying the motions to strike, with respect to the testimony of the witness Nakauchi?

III. Did the reference made to the testimony of the witness Nakauchi by the District Court and by the United States Attorney constitute prejudicial and reversible error?

Summary of Argument.

I. The District Court did not err in denying the motions for a directed verdict of not guilty against the appellant Goodman, made at the end of the Government's case and at the end of the entire case. The Circuit Court of Appeals will consider the evidence adduced at the trial in the light most favorable to the Government. If there was some competent and substantial evidence before the jury fairly tending to sustain the verdict, the action of the trial court in denying the motion for a directed verdict will not be reversed. The Appellate Court will not consider the weight of the evidence or pass upon the credibility of witnesses, since those determinations are exclusively within the province of the trial jury; and, if the evidence is conflicting, the verdict of the trial jury is conclusive, provided there was substantial evidence to sustain it. A conspiracy to commit a crime is different and totally distinguishable from the substantive offense, and thus to sustain the conviction for conspiracy it was not necessary for the Government to show that the sub-

stantive offense was consummated. While it is true that a mere supplier of goods who, without more, furnishes supplies to a member of a conspiracy of which the supplier had no knowledge and to which he was not a party, is not guilty of the conspiracy, nevertheless, where the supplier does engage in the conspiracy with full knowledge of its purpose and as an active participant, lending assistance in numerous ways, then he is guilty of the conspiracy.

II. The District Court did not err in overruling the objections and denying the motions to strike, with respect to the testimony of the witness Nakauchi. Wide latitude is permitted the trial court in admitting evidence of declarations and conduct of co-conspirators as proof of the unlawful conspiracy. Thus the acts and declarations of a co-conspirator performed and made after the conspiracy has been formed and in furtherance of its objects are admissible against all of the other co-conspirators, regardless of whether or not they had knowledge of those specific acts and declarations; and such acts and declarations are not hearsay when the Government has introduced other and independent evidence fairly tending to show the existence of the conspiracy.

III. The reference made to the testimony of the witness Nakauchi by the District Court and by the United States Attorney did not constitute prejudicial and reversible error. The control of the arguments of counsel made to the jury at the conclusion of trial is largely a matter of discretion for the trial court. Comments made by the prosecuting attorney in argument to the jury, where predicated upon admissible testimony, and such reasonable inferences as may be drawn therefrom are not prejudicial error; but, on the other hand, are proper and permissible in all respects.

ARGUMENT.

I.

The District Court Did Not Err in Denying the Motions for a Directed Verdict of Not Guilty Against the Appellant Goodman, Made at the End of the Government's Case and at the End of the Entire Case.

The appellant utilized Assignments of Error II and III, and seems to contend that the trial court committed reversible error in denying the motions for a directed verdict as to him [R. 133-135]. In support of this contention the appellant claims that the evidence fails to show that any crime was committed; that, at most, it merely indicates that industrial diamonds were purchased for the purpose of exportation to Japan; that there is no evidence tending to show that there was a conspiracy to export *without a license,* or that any of the diamonds were actually exported, or that, if they were exported, the person who exported them had no license [Appellant's Brief 14-29]. Further, in support of this contention, the appellant claims that his acts were in all respects lawful and that he is in the position of a mere supplier of goods and is therefore not shown to have been implicated in the conspiracy [Appellant's Brief 30-33].

Certain fundamental principles which have been laid down by this Honorable Circuit Court and other authorities with respect to review of a denial of motions for directed verdicts should be emphasized.

Upon review of the action of a trial court denying a motion for a directed verdict in a criminal case the reviewing court is under a duty to consider the evidence which was adduced at the trial in a light or aspect most favorable

to the Government. And this Honorable Circuit Court has so held on at least two occasions:

Rendleman v. United States, 38 Fed. (2d) 779, 780 (C. C. A. 9th, 1930);

United States v. Scarborough, 57 Fed. (2d) 137 (C. C. A. 9th, 1932).

Other Circuit Courts have invariably followed the same rule.

Knable v. United States, 9 Fed. (2d) 567, 569 (C. C. A. 6th, 1925);

Sloan v. United States, 287 Fed. 91, 92 (C. C. A. 8th, 1923);

Galatas v. United States, 80 Fed. (2d) 15, 23 (C. C. A. 8th, 1935).

See also:

O'Brien, Manual on Federal Appellate Procedure (1941) 88.

The scope of the appellate court's inquiry is further limited by the duty simply to declare whether the jury had the right to pass on what evidence there was before it, that is to say, merely whether there was sufficient evidence to warrant submission of the case to the jury.

Soininen v. United States, 279 Fed. 419 (C. C. A. 9th, 1922);

Crono v. United States, 59 Fed. (2d) 339, 340 (C. C. A. 9th, 1932).

Various tests have been stated and at times applied by appellate courts in carrying out this duty. The Supreme Court of the United States has pointed out that if there

was "substantial evidence tending to support the charges" against the defendants, the judgment of conviction based upon a verdict of guilty will not be reversed.

Stilson v. United States, 250 U. S. 583, 588 (1919);

Pierce v. United States, 252 U. S. 239, 251 (1920).

This Honorable Circuit Court has applied the same test in numerous cases, holding that it is not necessary in order to sustain a conviction that the appellate court be convinced beyond reasonable doubt that the defendant is guilty, since it is sufficient if there is present in the record "substantial evidence to sustain the verdict."

Vilson v. United States, 61 Fed. (2d) 901 (C. C. A. 9th, 1932);

United States v. Scarborough, 57 Fed. (2d) 137 (C. C. A. 9th, 1932);

Craig v. United States, 81 Fed. (2d) 816, 827 (C. C. A. 9th, 1936), cert. den. 298 U. S. 690 (1936);

Gorin v. United States, 111 Fed. (2d) 712, 721 (C. C. A. 9th, 1940), aff. 312 U. S. 19 (1941).

Moreover, where it appears that there is substantial evidence in support of the charges, a trial court is actually in error if it does peremptorily direct an acquittal.

Crono v. United States, 59 Fed. (2d) 339, 340 (C. C. A. 9th, 1932);

Pierce v. United States, 252 U. S. 239, 251 (1920).

See also:

O'Brien, Manual on Federal Appellate Procedure (1941) 88.

Some courts have gone so far as to state that if there is "any evidence at all to sustain a verdict of guilty," the appellate court will not reverse the verdict for insufficiency of the evidence.

Hedderly v. United States, 193 Fed. 561, 571 (C. C. A. 9th, 1912);

Cohen v. United States, 214 Fed. 23, 27 (C. C. A. 2d, 1914), cert. den. 235 U. S. 696 (1914);

Cooper v. United States, 232 Fed. 81, 83 (C. C. A. 2d, 1916), cert. den. 241 U. S. 675 (1916);

Bentel v. United States, 13 Fed. (2d) 327 (C. C. A. 2d, 1926), cert. den. 273 U. S. 713 (1926);

Berlin v. United States, 14 Fed. (2d) 497 (C. C. A. 3d, 1926).

However, the more recent and probably the better view now is that the denial by the trial court of a motion for a directed verdict in a criminal case is reviewable only for the purpose of ascertaining "whether there was some competent and substantial evidence before the jury fairly tending to sustain the verdict."

United States v. Socony Vacuum Oil Co., 310 U. S. 150, 254 (1940);

Abrams v. United States, 250 U. S. 616, 619 (1919);

Bold v. United States, 265 Fed. 581, 583 (C. C. A. 9th, 1920).

This Honorable Circuit Court has likewise consistently held that upon review of the denial by the trial court of a motion for directed verdict, the Circuit Court of Appeals cannot be called upon to weigh the testimony or substitute

its judgment of the evidence for that of the jury, since the determination of what weight to attach to the evidence adduced in the course of the trial is solely within the province of the jury, provided only that there has been presented for the jury's consideration some competent and substantial evidence fairly tending to prove the charges of the indictment.

Hedderly v. United States, 193 Fed. 561, 571 (C. C. A. 9th, 1912);

Bold v. United States, 265 Fed. 581, 583 (C. C. A. 9th, 1920);

Brolaski v. United States, 279 Fed. 1, 3 (C. C. A. 9th, 1922), cert. den. 258 U. S. 625 (1922);

McDonough v. United States, 299 Fed. 30, 38 (C. C. A. 9th, 1924), cert. den. 266 U. S. 613 (1924);

Rendleman v. United States, 38 Fed. (2d) 779, 780 (C. C. A. 9th, 1930);

Metzler v. United States, 64 Fed. (2d) 203, 209 (C. C. A. 9th, 1933);

Coplin v. United States, 88 Fed. (2d) 652, 664 (C. C. A. 9th, 1937), cert. den. 301 U. S. 703 (1937);

Gorin v. United States, 111 Fed. (2d) 712, 721 (C. C. A. 9th, 1940), aff'd 312 U. S. 19 (1941).

See also:

Sloan v. United States, 287 Fed. 91, 92 (C. C. A. 8th, 1923);

Knable v. United States, 9 Fed. (2d) 567 (C. C. A. 6th, 1925);

United States v. Bender, 60 Fed. (2d) 56, 57 (C. C. A. 2d, 1932), cert. den. 287 U. S. 598 (1932);
Galatas v. United States, 80 Fed. (2d) 15, 23 (C. C. A. 8th, 1935).

Accordingly, if there was adduced at the trial any competent and substantial evidence fairly tending to prove the facts charged, an appellate court will not disturb a conviction based upon a verdict of guilty, even though the evidence is highly conflicting.

Driskill v. United States, 281 Fed. 146 (C. C. A. 9th, 1922);
Bold v. United States, 265 Fed. 581, 583 (C. C. A. 9th, 1920);
5 *Cyc. Fed. Proc.,* Sec. 2272, p. 659.

It is the exclusive function of the jury to determine the weight that should be given to the testimony, and both trial courts and appellate courts are excluded from interfering with this function.

Lempie v. United States, 39 Fed. (2d) 19, 20 (C. C. A. 9th, 1930);
Vilson v. United States, 61 Fed. (2d) 901 (C. C. A. 9th, 1932).

In other words, that reasonable doubt which often prevents conviction must be the jury's doubt, and not that of any court, either of original or of appellate jurisdiction.

Craig v. United States, 81 Fed. (2d) 816, 827 (C. C. A. 9th, 1936), cert. den. 298 U. S. 690 (1936);
Felder v. United States, 9 Fed. (2d) 872, 875 (C. C. A. 2d, 1925), cert. den. 270 U. S. 648 (1926).

From this it follows that where there is sufficient evidence to go to the jury, an appellate court will not weigh the facts or pass judgment upon the relative merits of conflicting testimony. Such is for the jury, and for the jury alone, whose determination in that respect is conclusive.

Humes v. United States, 170 U. S. 210, 213 (1898);

Burton v. United States, 202 U. S. 344, 373 (1906);

Stilson v. United States, 250 U. S. 583, 588 (1919);

Abrams v. United States, 250 U. S. 616, 619 (1919).

Not only is an appellate court precluded from inquiring into the weight of the testimony and the propriety of inferences which a jury may draw therefrom, but it will refrain as a matter of course from passing upon the credibility of the witnesses. In other words, an appellate court will not invade another exclusive province of the jury, namely, the function of determining the credibility of witnesses.

Hinkhouse v. United States, 266 Fed. 977, 978 (C. C. A. 9th, 1920);

Duckwitz v. United States, 15 Fed. (2d) 195, 196 (C. C. A. 9th, 1926);

Lempie v. United States, 39 Fed. (2d) 19, 20 (C. C. A. 9th, 1930);

Rendleman v. United States, 38 Fed. (2d) 779, 780 (C. C. A. 9th, 1930);

Metzler v. United States, 64 Fed. (2d) 203, 209 (C. C. A. 9th, 1933);

Coplin v. United States, 88 Fed. (2d) 652, 664 (C. C. A. 9th, 1937), cert. den. 301 U. S. 703 (1937);

Barone v. United States, 94 Fed. (2d) 902 (C. C. A. 9th, 1938);

5 *Cyc. Fed. Proc.,* Sec. 2272, p. 659.

The reason for this limitation has been succinctly phrased in *Ghadiali v. United States,* 17 Fed. (2d) 236 (C. C. A. 9th, 1927), cert. den. 274 U. S. 747 (1927), where the court stated, at page 237:

> "The jury had before it all of the witnesses, could observe their demeanor, the reasonableness of the story, the opportunity of the witnesses for knowing the things about which they testified, the interest or lack of interest in the result of the trial and all other disclosed circumstances bearing upon the credibility of the witnesses, and could determine where the truth in the case lay and, if there is any evidence upon which rational minds might arrive at a like conclusion, this court cannot reverse the finding."

In the light of these well-settled principles and applying the tests indicated, it is clear that the contention pressed by the appellant on the appeal herein that the trial court erred in permitting the case to go to the jury is as unfounded in law as it is in the Record.

It should be remembered that the charge here is of conspiracy, and not of the commission of the substantive offense of exporting industrial diamonds without a license. For the purpose of this appeal, therefore, it is sufficient if the Record contains substantial evidence fairly tending to show that appellant Goodman participated in a conspiracy to export industrial diamonds without a license.

Of course, at the trial the burden of proof was upon the Government to show that such a conspiracy existed, but it was *not* necessary for the Government to prove that any *actual* exportation occurred. Consequently the authorities cited in appellant's brief (p. 18) have no pertinency to this appeal.

As was stated in the leading case on the subject:

> "A conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. * * * The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is nonetheless punishable."
>
> *United States v. Rabinowich,* 238 U. S. 78, 85-6 (1915).

This is but an amplified statement of the well-known rule that a conspiracy to commit a crime is different and totally distinguishable from the substantive offense.

See:

Callan v. Wilson, 127 U. S. 540, 555 (1888);

Clune v. United States, 159 U. S. 590, 595 (1895);

United States v. Stevenson (No. 2), 215 U. S. 200, 203 (1909);

Burton v. United States, 202 U. S. 344, 347 (1906);

Morgan v. Devine, 237 U. S. 632, 640 (1915);

United States v. Holte, 236 U. S. 140, 144 (1915);

Joplin Mercantile Co. v. United States, 236 U. S. 531, 535, 536 (1915).

Since conspiracy is separate and distinct from the substantive offense the essence of it as a crime is the unlawful combination, regardless of whether or not the purpose of the conspiracy is accomplished.

> *Proffit v. United States,* 264 Fed. 299, 300 (C. C. A. 9th, 1920).

See, also:

> *Ford v. United States,* 10 Fed. (2d) 339, 343 (C. C. A. 9th, 1926);
>
> *Parmagini v. United States,* 42 Fed. (2d) 721, 725 (C. C. A. 9th, 1930);
>
> *Ader v. United States,* 284 Fed. 13 (C. C. A. 7th, 1922);
>
> *Brady v. United States,* 24 Fed. (2d) 405 (C. C. A 8th, 1928);
>
> *Thompson v. Johnston,* 94 Fed. (2d) 355 (C. C. A. 9th, 1938).

Moreover, as has been held repeatedly by the United States Supreme Court with respect to the crime of conspiracy as defined by *Title 18, U. S. C., Section 88:*

> "The conspiracy is the offense which the statute defines without reference to whether the crime which the conspirators have conspired to commit is consummated."
>
> *Williamson v. United States,* 207 U. S. 425, 447 (1908).

Thus a person may be guilty of conspiring to commit a certain act although, at the same time, he may be incapable of committing that act.

United States v. Rabinowich, 238 U. S. 78, 85-86 (1915);

Williamson v. United States, 207 U. S. 425, 447 (1908);

United States v. Holte, 236 U. S. 140, 144 (1915).

This Honorable Circuit Court, in an appeal from a conviction for conspiring to impersonate an officer, pointed out:

> "As to the first, or conspiracy count, the question of whether or not the appellants actually represented themselves as United States officers is not material. To sustain the conspiracy count it was necessary for the government to prove only that the accused entered into an agreement so to represent themselves, and that, in furtherance of that agreement, they committed one of the overt acts charged in the indictment."

Heskett v. United States, 58 Fed. (2d) 897, 902 (C. C. A. 9th, 1932), cert. den. 287 U. S. 643 (1932).

See also:

Brown v. United States, 43 Fed. (2d) 906, 907 (C. C. A. 9th, 1930).

> "A criminal conspiracy to possess intoxicating liquor or in some other respect to violate the National Prohibition Act may be complete without the consummation of such other substantive offense."

Thus, although the evidence adduced at the trial in this case may not have convinced the jury that appellant Goodman himself exported the diamonds without a license, it may have, and from the verdict it appears that it did, satisfy the jury that Goodman was engaged in a conspiracy which had for its object such exportation.

See:

Middleton v. United States, 49 Fed. (2d) 538, 540 (C. C. A. 8th, 1931);

Allen v. United States, 89 Fed. (2d) 954, 955 (C. C. A. 4th, 1937);

Dealy v. United States, 152 U. S. 539, 547 (1894);

United States v. Britton, 108 U. S. 199, 204 (1883).

It may further be conceded, as appellant points out in his brief (pp. 23-25), that a trial jury may not infer guilt of a defendant from "pure conjecture," and that circumstantial evidence, in order to support a verdict of guilty, must be consistent with guilt and inconsistent with every reasonable hypothesis of innocence. For these principles appellant correctly cites:

United States v. Ross, 92 U. S. 281, 284 (1875);

Dahly v. United States, 50 Fed. (2d) 37, 43 (C. C. A. 8th, 1931);

Kennedy v. United States, 44 Fed. (2d) 131 (C. C. A. 9th, 1930);

Brown v. United States, 16 Fed. (2d) 682, 685 (C. C. A. 1st, 1926).

However, these same authorities clearly indicate that circumstantial evidence, where it *is* inconsistent with every reasonable hypothesis of innocence and consistent with guilt, is sufficient to sustain a conviction for conspiracy.

The chief contention of the appellant in this respect is that the conspiracy, which was proved at the trial, was merely a conspiracy to export the diamonds to Japan, and not a conspiracy to export *without a license* (Appellant's Brief 14-29). However, turning to the record, we find abundant testimony and evidence fairly tending to show that the conspiracy was to export *"without a license,"* and not merely to export.

In the first place it was stipulated that none of the defendants had a license authorizing or permitting him to export industrial diamonds from the United States, as required by law [R. 19]. Moreover, it was further stipulated that neither Keeler nor *Goodman* had a license to export industrial diamonds [R. 71].

The only purpose to be served by the purchase of the industrial diamonds through Goodman by Takahashi was exportation to Japan. Takahashi told Goodman this in a conversation he had with him in the former's home in June, 1941, stating that he would like to purchase diamonds to fill an order from Japan [R. 20]. Goodman said he would be able to supply them [R. 21-22].

Ten days later Takahashi told Keeler in the presence of Goodman, at the Musto-Keenan Co., that he had received an order from Japan for diamonds and he gave Keeler the name of the parties that sent him the order from Japan. This, too, occurred in front of Goodman [R. 24].

In addition Takahashi had a conversation with Keeler about the quality of the diamonds, Goodman being present. Takahashi told them that he had "received letters quite a bit from Japan in which they referred quite a lot to the quality." He further told them that "the demand that was made by Japan was that they wanted extra good quality" [R. 30-31].

The first time he learned that an export license was necessary was when he gave Goodman the list of merchandise that he wanted to obtain for export [R. 37]. Takahashi knew that he could not send industrial diamonds to Japan and for that reason asked Goodman to get an export license for him [R. 37].

Goodman had been associated in a company with Takahashi up to March 27, 1941, only two months before the beginning of the conspiracy charged here, and he knew that Takahashi was exporting various kinds of merchandise to Japan in 1939 [R. 106]. Consequently, Goodman certainly had knowledge that the only purpose for the purchase of the industrial diamonds was to export them to Japan. He knew, further, that it was necessary to have a license in order to export industrial diamonds, because he told Takahashi he would try to get him a license [R. 21].

Goodman knew that Takahashi had just come from Japan at the time he was approached about the purchase of diamonds, and he knew that there was an embargo on shipments to Japan [R. 112]. His only excuse is that "He didn't think a thing about there being any law violating involved" [R. 112].

The fact that Takahashi told Keeler and Goodman that there was an order from Japan for diamonds is corroborated by Takizawa [R. 47].

Nakauchi received industrial diamonds in three packages in September, 1941, in Goodman's office, there being present Takahashi, Takizawa, Keeler and Goodman [R. 51-52]. Moreover, he received other diamonds from Takizawa in July, 1941, and took them to San Francisco in a portable phonograph, traveling there with a friend, who was going back to Japan. He left the diamonds in a hotel room in San Francisco [R. 52-53].

Goodman signed a statement for McCormick, an F. B. I. man, in which he admitted that at one time, in either July, August or September of 1941, Takahashi had told him that he could not pay for the diamonds "until the ship gets in." On another occasion Takahashi told him "I will pay your commissions when the boat arrives" [R. 66].

Keeler admitted that the orders which were being sent in through Goodman by the Japanese, and which were being filled by him, Keeler, in the period from July to September, 1941, were the largest amounts of diamonds that had ever been sold in the history of the company [R. 94]. Moreover, Keeler admitted that up to that time he had never sold any industrial diamonds to Japanese. He asked "Goodman or [sic!] the Japanese what they were going to use the diamonds for," because he knew at that time that a proclamation had been issued by the President against exporting industrial diamonds without a license. But he claims his suspicions were not aroused, even though the sales of diamonds kept on increasing until September 16th, when the largest order was put through [R. 95].

It is further argued by the appellant (Appellant's Brief, 30-33) that under the doctrine laid down by the United States Supreme Court in *United States v. Falcone,* 311 U. S. 205 (1940), a directed verdict should have been entered holding Goodman not guilty.

Of course, it is well known that the settled doctrine in the Ninth Circuit for many years had been that, where the accused appears to have been in fact more closely connected with the buyer's crime than merely as a seller of goods which the seller knew would be used by the buyer in furtherance of the commission of a conspiracy, in such case the accused is guilty of participation in the conspiracy.

Pattis v. United States, 17 Fed. (2d) 562 (C. C. A. 9th, 1927);

Vukich v. United States, 28 Fed. (2d) 666, 669 (C. C. A. 9th, 1928);

Borgia v. United States, 78 Fed. (2d) 550, 555 (C. C. A. 9th, 1935).

This same rule had been laid down by the Seventh Circuit as well.

Anstess v. United States, 22 Fed. (2d) 594 (C. C. A. 7th, 1927);

Hubinger Co. v. United States, 64 Fed. (2d) 772 (C. C. A. 7th, 1933).

It had been followed in the Sixth Circuit.

Rudner v. United States, 281 Fed. 516, 520 (C. C. A. 6th, 1922).

On the other hand the Second and Fifth Circuits had held otherwise, and to the effect that the seller or supplier of goods, in order to be held guilty of participation in

the conspiracy, had to promote the venture itself in the sense of becoming an actual aider, abettor, and participant in the conspiracy.

Young v. United States, 48 Fed. (2d) 26 (C. C. A. 5th, 1931);

United States v. Peoni, 100 Fed. (2d) 401 (C. C. A. 2d, 1938);

United States v. Falcone, 109 Fed. (2d) 579 (C. C. A. 2d, 1940).

When the *Falcone Case* came up for review before the Supreme Court on certiorari the Government did not argue that conviction for conspiracy can rest on proof alone of knowingly supplying an illicit distiller who is in a conspiracy with others. However, it did contend that one who, with knowledge of a conspiracy to distill illicit spirits, sells material to a conspirator, knowing that they will be used in the distilling, is himself guilty of the conspiracy. The Supreme Court pointed out that this argument would not be considered on the merits, because the evidence in the trial of the *Falcone Case* showed—

"* * * only that respondents or some of them knew that the materials sold would be used in the distillation of illicit spirits, and fell short of showing respondents' participation in the conspiracy or that they knew of it."

United States v. Falcone, 311 U. S. 205, 208 (1940).

Because such were the facts and the evidence at the trial of the cause, the Supreme Court properly held that—

"* * * one who *without more* furnishes supplies to an illicit distiller is not guilty of conspiracy even

> though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge. *On this record we have no occasion to decide any other question.*" (Italics supplied.)
>
> *Id.,* pp. 210-211.

The inapplicability of the *Falcone Case,* therefore, to the question of the appellant Goodman's participation in the conspiracy here charged is manifest. Here, Goodman was not a mere supplier *"without more."* Moreover, the facts and the evidence at the trial in this cause did not show *only* that the supplier "knew that the materials sold would be used" in the illicit purpose; and certainly the facts and evidence did not fall short of showing the appellant's participation in the conspiracy or that he knew of it.

It is not necessary at this point for the Government to reiterate the numerous facts brought out not only by the testimony of Takahashi, Takizawa and Nakauchi, but also by the admissions of Keeler and Goodman, in order to show that Goodman, far from being a mere supplier of goods, was actually an active participant who engaged in the conspiracy with full knowledge of its purpose, lending assistance and aid in numerous ways and on numerous occasions throughout the four or five months' period. The Government, therefore, merely refers this Honorable Circuit Court to its outline of the evidence contained in the Statement of Facts, not only in this brief, but in the Appellant's Brief, and to the discussion of the evidence showing that the conspiracy was clearly one to export industrial diamonds *without a license.*

II.

The District Court Did Not Err in Overruling the Objections and Denying the Motions to Strike With Respect to the Testimony of the Witness Nakauchi.

The appellant attacks the trial court's ruling in admitting the testimony of the witness Nakauchi into the evidence on the ground that there was no independent testimony other than that of Nakauchi tending to show that a conspiracy existed and, hence, that Nakauchi's testimony was hearsay and not admissible. Assignment of Error of Goodman IV [R. 135-137] (Appellant's Brief, 33-34).

It is true that "a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict for the sins of a lifetime."

> *Terry v. United States,* 7 Fed. (2d) 28 (C. C. A. 9th, 1925).

However, a wide latitude is permitted to the prosecution in proving the essential elements of the conspiracy,

> *Metzler v. United States,* 64 Fed. (2d) 203, 207 (C. C. A. 9th, 1933),

and the unlawful scheme can be shown by declarations and conduct of the parties as well as by numerous other circumstances which lead to the logical inference of common purpose and design.

> *Cummings v. United States,* 15 Fed. (2d) 168, 169 (C. C. A. 9th, 1926);
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> *Coates v. United States,* 59 Fed. (2d) 173, 174 (C. C. A. 9th, 1932);
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> *Marino v. United States,* 91 Fed. (2d) 691-698 (C. C. A. 9th, 1937), cert. den. 302 U. S. 764 (1937).

When the offense charged is a conspiracy and one of the co-conspirators engages in activities and makes declarations after the conspiracy has been formed and in furtherance of its objects, those acts and declarations are admissible against all of the co-conspirators, regardless of whether they had knowledge of those specific acts and declarations or not. By joining in the scheme the co-conspirators are tainted by it, and by the act of joining they adopt as their own all of the acts and declarations which have theretofore been made in pursuance of its purpose.

Logan v. United States, 144 U. S. 263, 309 (1892);

Brown v. United States, 150 U. S. 98 (1893);

Coates v. United States, 59 Fed. (2d) 173, 174 (C. C. A. 9th, 1932).

It is not necessary that a co-conspirator know all the members of the conspiracy or the part which each played or was to play. He may join it at any point in its progress and be held responsible for all that may be or has been done.

United States v. Manton, 107 Fed. (2d) 834, 848 (C. C. A. 2d, 1938);

Laska v. United States, 82 Fed. (2d) 672, 677 (C. C. A. 10th, 1936), cert. den. 298 U. S. 689 (1936).

The testimony of Nakauchi, of course, tended to show that a conspiracy existed and that the conspiracy was to export industrial diamonds to Japan without a license. He testified, as pointed out above, that he received a number of industrial diamonds from Takizawa, one of

the co-conspirators; that in July, with a friend who was going to Japan, he went to San Francisco, taking the diamonds with him in a portable phonograph; and that he left them in a hotel room in San Francisco [R. 51-53].

If this were the only testimony which the Government adduced at the trial on the question of the existence of the conspiracy, then undoubtedly, under the doctrine of the *Tofanelli, Bartkus,* and *Mayola Cases,* such testimony of Nakauchi would have been hearsay and not admissible as against any of the co-conspirators except Nakauchi.

> *Tofanelli v. United States,* 28 Fed. (2d) 581 (C. C. A. 9th, 1928);
>
> *Bartkus v. United States,* 21 Fed. (2d) 425 (C. C. A. 7th, 1927); and
>
> *Mayola v. United States,* 71 Fed. (2d) 65 (C. C. A. 9th, 1934).

However, without going into the details of the testimony of each of the other witnesses, it is sufficient to point out that there is a plethora of testimony adduced through them by the Government, all of which tends to show the existence of the conspiracy; participation in it by all of the defendants, including the appellant Goodman; and the fact that it was a conspiracy formed for the purpose of exporting industrial diamonds *without a license.* See the testimony of the following: Takahashi [R. 20, 23-25, 27, 30-33]; Takizawa [R. 45-49]; McCormick [R. 64-67]; LeGrand [R. 76-80]; Keeler [R. 87-91], and Goodman [R. 99-106]. Thus not only by the testimony of witnesses other than Nakauchi is the existence of the conspiracy fully proved, but even by the admissions and signed statements of two of the co-conspirators, namely, Keeler *and the appellant Goodman himself.*

It is settled law, not open to challenge at this late date, that all declarations and acts made and done by a conspirator after the formation of the conspiracy and in furtherance of its object are always admissible against each and every of the co-conspirators, whether they have joined the conspiracy at the time of the statements or entered it after the statements were made.

Wiborg v. United States, 163 U. S. 632, 657-658 (1896);

United States v. Manton, 107 Fed. (2d) 834, 848 (C. C. A. 2d, 1938);

Van Riper v. United States, 13 Fed. (2d) 961, 967 (C. C. A. 2d, 1926), cert. den. 273 U. S. 702 (1926);

Ford v. United States, 10 Fed. (2d) 339 (C. C. A. 9th, 1926), cert. den. 273 U. S. 593 (1927);

Marino v. United States, 91 Fed. (2d) 691, 696 (C. C. A. 9th, 1937), cert. den. 302 U. S. 764 (1937);

Coates v. United States, 59 Fed. (2d) 173, 174 (C. C. A. 9th, 1932);

Levine v. United States, 79 Fed. (2d) 364, 370 (C. C. A. 9th, 1935);

Levey v. United States, 92 Fed. (2d) 688, 691 (C. C. A. 9th, 1937), cert. den. 303 U. S. 639 (1938).

Consequently it is impossible to see how it is claimed that the testimony of the witness Nakauchi was hearsay. It follows that the trial court did not err in overruling the objections and motions to strike with respect to that testimony.

III.

The Reference Made to the Testimony of the Witness Nakauchi by the District Court and by the United States Attorney Did Not Constitute Prejudicial and Reversible Error.

The appellant seems to contend that in the closing argument government counsel and the trial court committed reversible error in referring to the trip made to San Francisco by Takizawa. Assignment of Error V [R. 137-140] (Appellant's Brief, 24-25, 33-34). The contention seems to be that since Nakauchi's testimony was not admissible, inasmuch as there was no independent testimony of the conspiracy, any comment on it by the United States Attorney or by the trial court is reversible error. The point, however, is not argued at any length in the appellant's brief and, since it stands or falls with the admissibility of Nakauchi's testimony, there would appear to be no reason for arguing it here.

It is clear that the control of the arguments of counsel made to the jury at the conclusion of the trial is largely a matter of discretion of the trial court. That discretion will not be interfered with unless so abused as to clearly cause prejudicial error.

> *Hyde v. United States,* 35 App. D. C. 451 (1910), affirmed 225 U. S. 347 (1912).

Moreover, comments by the prosecuting attorney made in argument to the jury, where based on evidence properly admitted, as tending to establish the conspiracy are within proper scope of the argument.

> *Richards v. United States,* 175 Fed. 911 (C. C. A. 8th, 1909).

Counsel for the Government may make any argument which is based on evidence or may be reasonably inferred therefrom.

> *Malone v. United States,* 94 Fed. (2d) 281 (C. C. A. 7th, 1938), cert. den. 304 U. S. 562.

From this it follows, as has been held by this Honorable Circuit Court, that error cannot be predicated upon an argument which is based on testimony and such reasonable inferences as may be drawn therefrom.

> *Borgia v. United States,* 78 Fed. (2d) 550 (C. C. A. 9th, 1935), cert. den. 296 U. S. 615.

In the instant cause it is clear that if the testimony of Nakauchi was admissible, and it was so shown to be by the Government in Point II of its brief herein, the comment by the prosecuting attorney thereon was eminently proper. It was a true and fair statement of the evidence as related in the testimony of Nakauchi.

It is true, of course, that the court, in commenting upon the evidence, inadvertently used the name "Takizawa" instead of "Nakauchi" [R. 117]. However, any false impression, if such there was created, was immediately thereafter corrected by the prosecuting attorney, who emphasized that the testimony was that of Nakauchi and not of Takizawa [R. 117].

In the view of the Government therefore, since the testimony of Nakauchi was admissible, the comments made by the court and prosecuting attorney were not only incapable of causing prejudicial error but, by the very

nature of things, proper in all respects. For which reason the Government submits that the reference made to the testimony of witness Nakauchi by the trial court and Government counsel did not constitute prejudicial or reversible error.

Conclusion.

Wherefore it is respectfully submitted that the judgment of conviction with respect to the appellant Goodman should be affirmed.

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